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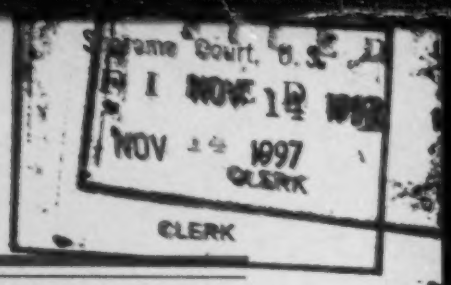

No. 97-486

In the Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL BRYANT BRUMLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

17 pp

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1346 extends the reach of the wire fraud statute to encompass deprivation of the right to honest governmental services.

2. Whether petitioner's prosecution exceeded Congress's power under the Commerce Clause, and whether petitioner's conviction is inconsistent with the Tenth Amendment.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 41a-84a) is reported at 116 F.3d 728. Prior opinions of a panel of the court of appeals (Pet. App. 1a-13a, 14a-38a) are reported at 59 F.3d 517 and 79 F.3d 1430.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1997. The petition for a writ of certiorari was filed on September 15, 1997, and was placed on the Court's docket on September 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Eastern District of Texas, petitioner was convicted on one count of conspiring to commit mail fraud and wire fraud (18 U.S.C. 371, 1341, 1343, and 1346); three counts of wire fraud (18 U.S.C. 1343 and 1346); two counts of money laundering (18 U.S.C. 1956); and two counts of making false statements to a financial institution (18 U.S.C. 1014). He was sentenced to 48 months' imprisonment, to be followed by three years' supervised release. A panel of the court of appeals reversed his conspiracy, wire fraud, and money laundering convictions but affirmed his false statements convictions. Pet. App. 1a-13a, 14a-38a. On rehearing en banc, the court of appeals affirmed his convictions. Pet. App. 41a-84a.

1. From July 1976 until July 1988, petitioner was a pre-hearing examiner for the Texas Industrial Accident Board (IAB), which handled workers' compensation cases. In July 1988, he was promoted to a regional director at the IAB. In 1990, the state legislature changed the process for handling workers' compensation claims and reorganized the IAB into the Texas Workers' Compensation Commission (TWCC). Petitioner was promoted to Regional Associate Director for the TWCC. Pet. App. 5a, 17a-18a, 46a; Gov't C.A. Br. 3-4. His duties included identifying lawyers and insurance companies who failed to follow IAB or TWCC rules and regulations. Pet. App. 46a.

Petitioner was unable to live within his income. As early as 1982, he started asking for loans from attorneys who represented workers' compensation claimants. Pet. App. 46a. By 1988 petitioner had borrowed money from at least eight lawyers. One of

them was co-defendant John M. Cely, a lawyer whose firm had a substantial workers' compensation practice; Cely and members of his firm made frequent appearances before petitioner in workers' compensation cases. *Id.* at 47a. From July 1987 until May 1992, Cely made approximately 70 wire transfers through a Western Union office outside of Texas involving an aggregate of over $86,700. *Ibid.*; Gov't C.A. Br. 4. Ostensibly, those payments were "loans," but they were never repaid. *Ibid.* Petitioner also "borrowed" approximately $25,000 from other lawyers. Pet. App. 47a.

In 1988, during the time that Cely was paying petitioner, the IAB began an investigation of Cely because of a written complaint filed by one of Cely's former clients. Petitioner several times urged the IAB to reconsider its decision to investigate Cely. Pet. App. 6a, 18a; Gov't C.A. Br. 5. Petitioner also told Cely how to modify documents from other cases that the IAB had subpoenaed from Cely. Pet. App. 6a; Gov't C.A. Br. 7. Further, petitioner aided Cely in his attempt to lease office space to TWCC, which was in violation of TWCC ethical guidelines. Pet. App. 6a; Gov't C.A. Br. 7-8.

2. On appeal, petitioner argued inter alia that his indictment, which charged him with defrauding "the citizens of the State of Texas, including the Texas Industrial Accident Board and [the TWCC], a State agency, of the intangible right to good, faithful and honest service," (Superseding Indict., Counts 2-4, Wire Fraud, ¶ 2) did not state a crime under Sections

1343 and 1346,[1] the latter of which was enacted after this Court's decisions in *McNally* v. *United States*, 483 U.S. 350 (1987), and *Carpenter* v. *United States*, 484 U.S. 19 (1987). In its initial decision, the court of appeals held that there was insufficient evidence that petitioner caused interstate wire transfers. The court therefore reversed petitioner's convictions, with the exception of his false statements convictions, on sufficiency of the evidence grounds. Pet. App. 7a-12a. The panel then vacated that decision and, in a divided decision, held that the wire fraud statute did not reach petitioner's conduct because Section 1346 did not apply to schemes to deprive state governments of intangible rights. Pet. App. 14a-37a. Judge Wood dissented; he would have held that the amendment to the definition of a scheme to defraud for purposes of mail and wire fraud statutes contained in Section 1346 meant that petitioner's conduct did violate the wire fraud statutes. *United States* v. *Brumley*, 79 F.3d 1430, 1452 (5th Cir. 1996).[2]

The court of appeals then granted rehearing en banc and reinstated petitioner's wire fraud, conspiracy, and money laundering convictions. Pet. App. 41a-56a. The en banc court rejected petitioner's argument that Section 1346 does not apply to schemes to deprive an entity of state government of the in-

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[1] Section 1346 added a definitional provision applicable to the mail and wire fraud statutes, Sections 1341 and 1343. Section 1346 states:

> For the purposes of this Chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

[2] The appendix to petitioner's petition for a writ of certiorari does not contain Judge Wood's dissent.

tangible right to honest services. The en banc majority first held that the term "another" in Section 1346 includes a governmental entity, because, the court reasoned, "another" defines the range of victims, not the perpetrator of the crime. Pet. App. 48a-49a. The court also rejected petitioner's argument that Section 1343 and Section 1346 do not reach abuses of state office involving the deprivation of intangible rights. The court determined that Congress, in enacting Section 1346, intended to reverse the holding in *McNally* and to provide "that the fraud statutes cover deprivations of intangible rights" such as were involved here. *Id.* at 50a.

The court also held that the statutory term "honest services" includes "honest and impartial government." Pet. App. 48a. In reaching that conclusion, the court determined that, "[u]nder the most natural reading of the statute, a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law[,]" *i.e.*, that "the official must act or fail to act contrary to the requirements of his job under state law." *Id.* at 53a. In other words, according to the court, if the official does all that is required under state law, an allegation that he did not perform his services "honestly" does not satisfy the mail or wire fraud statutes. *Id.* at 53a-54a. The court also concluded that deprivation of "*citizens*' rights to honest services" would not suffice to make out a violation of Section 1346. *Id.* at 54a.

The court applied those principles to petitioner's conduct and found that he had violated the wire fraud statute. The court found that petitioner, who had adjudicatory authority in a state agency, accepted payments from lawyers who practiced before him and

acted for those lawyers in his official capacity. According to the court, those actions were contrary to petitioner's state law duties and meant that he had deprived his employer[s] of his honest services. Pet. App. 54a. The court also observed that petitioner's actions constituted a violation of state law and of his state law duties, so there was no specter of federal criminalization of conduct that would have been innocent under state law. *Id.* at 54a-56a.

Judges Jolly, DeMoss, and Smith dissented on the ground that, in their view, the statutory language of Section 1346 was not sufficiently clear to cover petitioner's conduct. Pet. App. 56a-78a.

ARGUMENT

1. Petitioner contends (Pet. 7-16) that the court of appeals construed Section 1346 too broadly and that its interpretation conflicts with decisions in other courts of appeals. Contrary to petitioner's claim, the decision below is correct and does not conflict with any other court of appeals' ruling. Further review therefore is not warranted.

a. In *McNally* v. *United States*, 483 U.S. 350, 356 (1987), this Court held that the mail fraud statute applies only to schemes to defraud persons of property rights and not to schemes to defraud them of the intangible right to honest government services. In response to that decision, Congress passed Section 1346, which was enacted to "restore[] the mail fraud provision to where that provision was before the *McNally* decision." Pet. App. 70a (quoting statement of Rep. Conyers).

Petitioner argues (Pet. 8-9) that Section 1346 was not "invited" by *McNally* and does not satisfy that case's supposed requirement that any restoration of

the intangible rights doctrine under the mail fraud statute be clear. Contrary to petitioner's reading of Section 1346, other courts have concluded that Congress plainly intended Section 1346 to reverse *McNally*'s construction of the scope of the mail fraud statute and to restore pre-*McNally* case law. See *United States* v. *Frost*, 125 F.3d 346, 364 (6th Cir. 1997) ("Every court to address the effect of § 1346 has held that it has overruled the holding in *McNally*."); *United States* v. *Grandmaison*, 77 F.3d 555, 566 (1st Cir. 1996); *United States* v. *Waymer*, 55 F.3d 564, 568 n.3 (11th Cir. 1995), cert. denied, 116 S. Ct. 1350 (1996); *United States* v. *DeFries*, 43 F.3d 707, 709 n.1 (D.C. Cir. 1995); *United States* v. *Dischner*, 974 F.2d 1502, 1518 n.16 (9th Cir. 1992), cert. denied, 507 U.S. 923 (1993); *United States* v. *Martinez*, 905 F.2d 709, 715 (3d Cir.), cert. denied, 498 U.S. 1017 (1990). No greater clarity is required to justify application of the mail and wire fraud statute to deprivations of intangible rights.

b. Petitioner also incorrectly argues (Pet. 9-10) that the court below wrongly interpreted the statutory term "another" to include a state governmental entity as a victim of his wire fraud scheme. Section 1346 states that the phrase "scheme or artifice to defraud," as used in the mail and wire fraud statutes, "includes a scheme or artifice to deprive another of the intangible right of honest services." Contrary to petioner's argument, the term "another" in Section 1346 does encompass a State as the victim of a mail or wire fraud scheme. As the Eleventh Circuit recently observed, "[n]either the plain language of section 1346 nor its legislative history supports the limitation" that petitioner urges. *United States* v. *Castro*, 89 F.3d 1443, 1456 (1996), cert. denied, 117 S. Ct. 965

(1997). That court pointed out that, before Section 1346's enactment, the courts had applied the mail fraud statute's protections to state governmental entities. The Eleventh Circuit believed that the same protections should apply under Section 1346, particularly since Congress intended that statute to reinstate pre-*McNally* case law. 89 F.3d at 1456. In light of the statutory language and congressional intent, that conclusion is correct.

c. Petitioner also contends (Pet. 10) that his conviction rests on the appearance of a conflict of interest in violation of a state ethics statute. But the court of appeals specifically found that the government had to prove that "conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law[,]" *i.e.*, that "the official must act or fail to act contrary to the requirements of his job under state law." Pet. App. 53a. According to the court, if the official did all that is required under state law, an allegation that he did not perform his services "honestly" does not satisfy the mail or wire fraud statutes. *Id.* at 53a-54a. The court also said that deprivation of citizens' general rights to honest services from government employees would not suffice. *Id.* at 54a.

Hence, it is clear that the court below did not affirm petitioner's conviction on the basis of an appearance of a conflict of interest. Instead, the court found that petitioner had adjudicatory authority in a state agency, and that he accepted payments from lawyers who practiced before him and acted for those lawyers in his official capacity. According to the court, those actions were contrary to petitioner's state law duties and meant that he provided dishonest services to his employer. Pet. App. 54a. Petitioner accepted $86,780

in payments from Cely, vouched for Cely's good character when Cely was investigated by IAB, and tried to put a stop to the IAB investigation. Petitioner also advised Cely to alter documents so that it would be impossible to detect any wrongdoing. *Id.* at 55a. In addition, petitioner aided Cely's attempt to lease property to the TWCC and discouraged the agency from leasing from another bidder. *Id.* at 56a. Those actions extend far beyond a mere appearance of a conflict of interest.[3]

d. Petitioner is incorrect to assert (Pet. 14-16) that the opinion below conflicts with decisions by other circuits. For example, in *United States* v. *Sawyer*, 85 F.3d 713, 728-729 (1996), the First Circuit held that violation of a state gift statute, which prohibited appearances of—but not actual—corruption,

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[3] For these same reasons, petitioner is wrong when he claims that the court below based his conviction on violations of Tex. Penal Code Ann. § 36.08 (Vernon 1996), which, he claims, prohibits ethical misconduct only and does not require proof of fraudulent intent. See Pet. 12-13. But the district court did not base its findings on petitioner's violation of the Texas statute. Instead, the trial court specifically found that petitioner possessed fraudulent intent (Gov't C.A. Br. 11-13, citing 6 R. 9-12), and the court of appeals agreed. Pet. App. 56a.

Petitioner also argues (Pet. 13-14) that the theories on which the district court and the court of appeals affirmed his convictions constituted a variance from the charges in the indictment. He claims that the indictment charged only ethical violations, but he mischaracterizes the nature of the charges in the indictment. In fact, the indictment alleged that petitioner caused IAB documents to be transferred to Cely, that he showed favoritism to Cely, and that petitioner notified Cely of the IAB investigation of Cely. Superseding Indict., Additional Relevant Facts ¶ B23; Count 1, Manner and Means ¶ 2; Overt Acts ¶ 3.

could not form the basis for a mail fraud prosecution. Consistent with that holding, the court below said that Sections 1343 and 1346 do not reach "a violation of state law that prohibits only appearances of corruption[.]" Pet. App. 53a. Indeed, the court cited *Sawyer* for that proposition. *Ibid.* Hence, the decision below agrees with *Sawyer* rather than conflicts with it. The same is true of *United States* v. *Czubinski*, 106 F.3d 1069 (1st Cir. 1997), on which petitioner bases a claim of a conflict. See Pet. 15. There, the court reversed an IRS employee's wire fraud convictions because, although he had looked at taxpayer files without authorization, he carried out his official tasks properly and there was no proof that he intended to use information in the IRS files for his private purposes, so there was no evidence of a scheme to defraud. *Id.* at 1077. Here, by contrast, petitioner "engaged in a conspiracy in which Cely would give [petitioner] money and [petitioner] would use his position with the IAB and TWCC to assist Cely's dealings with the agency." Pet. App. 56a. That alone demonstrated that petitioner did not fulfill his official tasks.

Petitioner also wrongly argues (Pet. 15) that this case conflicts with *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979). In *Rabbitt*, the defendant was a state legislator who, in return for a 10% fee, aided an architectural firm in obtaining state contracts. 583 F.2d at 1020. The award of the contract did not fall within Rabbitt's official duties, however, and the evidence did not demonstrate that he failed to carry out his official legislative duties to aid the architects or that he had an affirmative duty to disclose his interest. Accordingly, the court of appeals held that he had not de-

frauded the citizens of his State of his honest and faithful services. *Id.* at 1026. Here, by contrast, petitioner did have a duty to disclose his relationship with Cely, and he plainly failed to do so. Consequently, the decision below does not conflict with *Rabbitt*.[4]

2. Petitioner also argues (Pet. 16-20) that his conviction is inconsistent with the Tenth Amendment and exceeds Congress's power under the Commerce Clause. Neither of these claims has merit.

Petitioner first claims that his conduct was purely of concern to the State and should not have been the

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[4] Petitioner also cites other cases that he claims stand for a requirement of "some degree of job related self dealing resulting in a profit" before a defendant may be deemed to have violated Section 1346. Pet. 16. In fact, those cases do not support that claim. For example, in *United States* v. *Martinez*, 905 F.2d at 712-715, the issue was whether an unissued state license was property within the meaning of the mail fraud statute, not whether Section 1346 applied. In *United States* v. *Alkins*, 925 F.2d 541, 548-549 (2d Cir. 1991), the issue was whether Section 1346 was improperly applied retroactively, not whether the defendants' actions violated the mail fraud statute as applicable under Section 1346. And *United States* v. *Bryan*, 58 F.3d 933, 940-941 (4th Cir. 1995), does not help petitioner since the court held that the government need not prove a violation of state law. In *United States* v. *Paradies*, 98 F.3d 1266, 1282-1283 (11th Cir. 1996), cert. denied, 117 S. Ct. 2483 (1997), the court found that there was evidence of bribery, but the court did not say that such evidence was required in every case to satisfy Section 1346. In *United States* v. *Castro*, 89 F.3d at 1455-1456, the court rejected the defendants' claim that Section 1346 restricted the reach of the mail and wire fraud statutes to nongovernmental victims. Finally, *United States* v. *Waymer*, 55 F.3d at 568 note 3, merely said that the purpose of Section 1346 was to restore the mail and wire fraud statutes to their pre-*McNally* position.

subject of a federal prosecution. Petitioner claims that if he is "a criminal, he is a criminal only to the extent that the appearance of his conduct was unacceptable to the State of Texas as his employer." Pet. 17. But, as the court of appeals recognized, petitioner's conduct was not innocent under either state or federal law. Pet. App. 55a-56a. As we have shown, petitioner's conduct involved more than a mere appearance of a conflict of interest; instead, he intentionally committed fraud. Under those circumstances, the court below correctly concluded that "[t]he tension inherent in federal criminalization of conduct by state officials innocent under state law is absent here." *Id.* at 55a.[5]

Petitioner also relies on *United States* v. *Lopez*, 514 U.S. 549 (1995), to argue that his wire fraud prosecution exceeded Congress's power under the Commerce Clause. *Lopez* involved the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q); this Court held that that statute was beyond Congress's power under the Commerce Clause. In *Lopez*, the Court observed that "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 514 U.S. at 561. The Court further noted that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." *Id.* at 562. Those deficiencies in 18 U.S.C. 922(q) are in direct contrast to the express terms of the wire fraud statute, which deals directly with commerce.

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[5] The fact that petitioner's conduct was illegal under both federal and state law also defeats petitioner's Eighth and Ninth Amendment arguments.

Hence, unlike the statute at issue in *Lopez*, which regulated mere possession of an otherwise lawful firearm, the wire fraud statute on its face "addresses a clearly commercial activity that has long been within federal power to regulate." *United States* v. *Tucker*, 90 F.3d 1135, 1140 (6th Cir. 1996).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney

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